(12) (10) (2)

NOS. 87-1614, 87-1639 and 87-1668

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN W. MARTIN, ET AL., Petitioners
v.
ROBERT K. WILKS, ET AL., Respondents

PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, ET AL., Petitioners
v.
ROBERT K. WILKS, ET AL., Respondents

RICHARD ARRINGTON, JR., ET AL., Petitioners
v.
ROBERT K. WILKS, ET AL., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF ALABAMA, ARKANSAS, CALIFORNIA, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, TEXAS, VERMONT, VIRGINIA, WEST VIRGINIA, WISCONSIN, WYOMING, THE DISTRICT OF COLUMBIA, AND THE VIRGIN ISLANDS, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Interest of Amici Curiae

Amici, the states and other jurisdictions identified above, submit this brief in support of Petitioners. Amici respectfully urge this Court to rule that persons with notice of litigation, and an opportunity to intervene on a timely basis before entry of a consent decree in that litigation, should not be permitted to attack the decree collaterally in a subsequent action.

The resolution of this case will have dramatic implications for the continued efficacy of consent decrees as remedial devices in Title VII litigation and, in all likelihood, in other contexts as well. If adopted by this Court, the Eleventh Circuit's minority rule permitting collateral attacks on

consent decrees will substantially undermine the utility of such decrees.

As representatives of state employers and state personnel administrators, many of whom are parties to consent decrees in employment discrimination cases, amici have a strong interest in preserving the efficacy of consent decrees, especially in light of Congress' preference for cooperation and voluntary compliance in the area of equal employment opportunity. In this same capacity, amici have a strong interest in opposing the adoption of unworkable procedural rules, such as mandatory joinder of potentially affected employees in Title VII suits.

In addition, as chief law enforcement officers, amici have an

interest in vigorous enforcement of antidiscrimination law. Consent decrees are valuable enforcement tools which, if freely subject to collateral attack, will be far less effective.

As set forth fully below, amici respectfully urge that the judgment of the court below be reversed.

STATEMENT OF THE CASE

In January 1974, Petitioners John W. Martin, et al. commenced a Title VII action against the City of Birmingham, Alabama and the Jefferson County Personnel Board, alleging discriminatory hiring and promotion practices in the Police and Fire Departments. In 1975, the United States brought a similar action. Existing city employees and their unions were well aware of the litigation from the beginning; in fact,

the Birmingham Firefighters Association monitored the case and supplied information to assist in its defense. Joint Appendix ("J.A."), 772-773.

In 1976, a trial was held on the validity of certain entry-level examinations. The district court found discrimination and ordered race-conscious relief. J.A.553-589. In 1979, a second trial was held on the validity of other employment and promotional practices. J.A. 594. Before the court rendered a decision, the parties commenced settlement negotiations. In 1981, the parties entered into two proposed consent decrees. Appendix to Petitions for Writ of Certiorari ("Pet. App."), 122a-235a.

Notice inviting "all persons who have an interest which may be affected

by the Consent Decrees" to appear at a fairness hearing was subsequently given by publication in two local newspapers and by mail to class members. Pet. App. 146a-147a; 171a-192a; 222a-223a; 248a; J.A. 695; 697-698. The Firefighters Association filed objections to the decrees and, through Raymond Fitzpatrick -- the same attorney who represents Respondents here -- argued at the fairness hearing that the decrees' race-conscious relief violated Title VII and the Fourteenth Amendment. J.A. 699-713; 732-740; 770. The court offered Mr. Fitzpatrick an opportunity to present evidence, but the offer was declined. J.A. 732. The day after the hearing, the Firefighters Association moved to intervene in the case. J.A. 774-776. In August 1981, the district

court approved the decree and denied the motion as untimely. Pet. App. 236a-249a. The Eleventh Circuit subsequently affirmed. United States v. Jefferson County, 720 F.2d 1511, 1516-19 (11th Cir 1983); J.A. 149-161.

Beginning in April 1982, the City proposed to promote certain black employees pursuant to the consent decrees. J.A. 40-41. Competing white applicants, again represented by Mr. Fitzpatrick, commenced five "reverse discrimination" cases against the City and Personnel Board attacking the validity of the consent decrees and seeking to enjoin the promotions. Pet. App. 110a-121a; J.A. 35-36; 38-39; 91-100; 130-134. Petitioners John Martin, et al., who were plaintiffs in the original Title VII litigation, promptly intervened (over

Respondents' objection) in order to defend the consent decrees, and all defendants sought to dismiss the new suits as impermissible collateral attacks on the consent decrees. J.A. 43-47; 52; 101-103; 106-108; 165-171; 175-178; 185-187.

After a five day trial in December of 1985, the district court concluded that the reverse discrimination plaintiffs could not collaterally attack the consent decrees, and that in any case the decrees were lawful, and thus that the challenged promotions were not unlawfully discriminatory. J.A. 26-29; Pet. App. 67a-68a; 106a-107a. On appeal, the Eleventh Circuit concluded that plaintiffs were not bound by the consent decrees, reasoning that only

parties to prior litigation may be bound by orders issued in that litigation. In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492, 1498 (11th Cir. 1987); Pet. App. 12a-20a. Apparently overlooking the district court's disposition of the case on the merits, the Eleventh Circuit remanded the case for trial. This Court granted petitions for writs of certiorari on June 20, 1988.

SUMMARY OF ARGUMENT

Amici urge this Court to hold that those who have notice and an opportunity to intervene on a timely basis in proceedings culminating in a consent decree may not collaterally attack that decree in a subsequent lawsuit. This Court has twice embraced the principle that persons who bypass an opportunity

to intervene may be subject to preclusion, and the vast majority of lower courts have barred collateral attacks on consent decrees. Like other judicially-created rules of preclusion -- including other exceptions to the general rule that only parties to prior litigation may be bound -- the rule amici urge serves the compelling interests underlying the doctrines of res judicata and collateral estoppel.

The minority rule adopted by the Eleventh Circuit, by contrast, seriously undermines the interests protected by rules of preclusion. As applied to public employers, the Eleventh Circuit's rule will impede and delay resolution of divisive Title VII cases, will discourage settlement and undermine the utility of consent decrees, will

potentially force state agencies into contempt of one of two inconsistent court orders, will discourage interested persons from intervening and instead encourage tactical maneuvering and wasteful relitigation, and will force courts to second-guess orders issued by other courts in derogation of settled policies of comity. And, these kinds of problems are likely to arise in contexts other than Title VII if the Court adopts the Eleventh Circuit's rule as its own.

In addition to promoting important policies, a rule of preclusion that requires interested parties with fair notice of the proceedings to intervene satisfies due process requirements, which require notice and a meaningful opportunity to be heard, not a hearing in fact. Moreover, while amici believe

that the opportunity to intervene on a timely basis is itself sufficient to satisfy due process, in this case Respondents were in fact heard in opposition to the consent decree, through their attorney, at a full fairness hearing prior to adoption of the decree.

Finally, this Court should reject any suggestion that involuntary mass joinder of potentially affected persons, rather than self-selected intervention, is the appropriate means to ensure that a decree has binding effect. Such a rule would create enormous practical problems, impose substantial financial burdens on all concerned, spawn wasteful litigation about the question of whom to join, and erect formidable obstacles in the path of plaintiffs claiming

discrimination, by forcing them to sue not only their employers, but their colleagues, as well. These problems cannot be solved by joinder of a defendant class or of a union, which would create significant problems of their own. But these difficulties can and will be avoided if this Court adopts the rule amici urge.

ARGUMENT

I. THOSE WITH NOTICE AND AN OPPORTUNITY TO INTERVENE IN PROCEEDINGS CULMINATING IN A CONSENT DECREE SHOULD NOT BE PERMITTED TO ATTACK THAT DECREE IN A SUBSEQUENT LAWSUIT

No fewer than six of the eight courts of appeals that have considered the question have barred collateral attacks on consent decrees. See Culbreath v. Dukakis, 630 F.2d 15, 22-23 (1st Cir. 1980); Devereaux v. Geary, 765 F.2d 268, 271 (1st Cir. 1985), cert. denied 106 S.

Ct. 3337 (1986); Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), aff'd by an equally divided Court, 108 S. Ct. 586 (1988); Goins v. Bethlehelm Steel Corp., 657 F.2d 62 (4th Cir. 1981), cert. denied 455 U.S. 940 (1982); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Striff v. Mason, 849 F.2d 240 (6th Cir. 1988); Stotts v. Memphis Fire Dep't., 679 F.2d 561, 558 (6th Cir. 1982), rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Dennison v. City of Los Angeles Dep't of Water & Power, 658 F.2d 694, 696 (9th Cir. 1981). In addition, the Third Circuit has summarily affirmed a decision holding a collateral attack on a Title VII consent decree

impermissible, O'Burn v. Shapp, 70 F.R.D. 549, 552-553 (E.D. Pa) aff'd mem. sub nom. Lutz v. Shapp, 546 F.2d 417 (3d Cir. 1976), cert. denied 430 U.S. 968 (1977), and has applied the rule in other contexts, see, e.g., National Wildlife Federation v. Gorsuch, 744 F.2d 963 (3d Cir. 1984); Society Hill Civil Ass'n v. Harris, 632 F.2d 1045, 1052 (3d Cir. 1980). By contrast, only one other court of appeals has joined the Eleventh Circuit in taking the contrary view. See Dunn v. Carey, 808 F.2d 555 (7th Cir. 1986). As amici set forth below, a rule barring collateral attacks brought by persons who had notice and the opportunity to intervene before entry of the decree is fully warranted by principles of preclusion law, meets due

process requirements, and should be adopted by this Court.[1/]

A. Established Principles of Preclusion Fully Support A Rule Barring Collateral Attacks By Those Who Had Notice and An Opportunity to Intervene

The rule barring collateral attacks is grounded in the recognition that

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1/ There is nothing to the contrary in this Court's decision in Local 93, International Association of Fire-fighters v. City of Cleveland, 106 S. Ct. 3068 (1986). There, the Court recognized that "[a] court's approval of a consent decree between some of the parties...cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." Id. at 3079 (emphasis added). But, because Local No. 93 had "failed to raise any substantive claims" before the entry of the consent decree, the Court, in affirming the approval of the decree, expressly raised the question "[w]hether it is now too late to raise such claims...." Id. at 3080. In short, the Court carefully reserved the possibility that opponents of Title VII consent decrees may lose any claims not timely raised.

permitting separate lawsuits to challenge a consent decree "would raise the specter of inconsistent or contradictory proceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement in Title VII actions." Marino v. Ortiz, 806 F.2d at 1146. The Eleventh Circuit ignored all of these factors, because it found singularly dispositive the fact that Respondents were not parties to the prior proceedings. In applying so inflexible a rule, however, the court below plainly erred.

1. The Compelling Interests Supporting Preclusion Have Led to Many Judicially-Created Exceptions to the Rule That Only Parties May Be Bound

Although "the general rule is that non-parties to the first action are not bound by a judgment or resulting determination of issues," Sealand Services, Inc. v. Gaudet, 414 U.S. 573, 593 (1974), this Court has recognized that "several exceptions exist," id. at 593 -- including many exceptions carved out by judges.

For example, persons whose interests were actually represented by a party are bound. See, e.g., Nevada v. United States, 463 U.S. 110, 139 (1983); Sea-Land Services, 414 U.S. at 593; Hansberry v. Lee, 311 U.S. 32, 42-43 (1940); Heckman v. United States, 224

U.S. 413, 445-446 (1912). Likewise, a non-party is bound by a decision where his interests are "so similar to a party's" that the party was his "virtual representative" in the previous action. United States v. Geophysical Corp., 732 F.2d 693, 697 (9th Cir. 1984); see Aerojet General Corporation v. Askew, 511 F.2d 710, 719 (5th Cir.), cert. denied 423 U.S. 908 (1975); Cotton v. Federal Land Bank of Columbia, 676 F.2d 1368 (11th Cir.), cert. denied 459 U.S. 1041 (1982); Mother's Restaurant, Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1572 (Fed. Cir. 1983). Further, non-parties who exercise significant "control" over litigation are also subject to preclusion. See, e.g., Montana v. United States, 440 U.S. 147, 154-155 (1979); Drummond v. United

States, 324 U.S. 316, 318 (1945); Souffront v. Companie des Sucreries, 217 U.S. 475, 486-487 (1910). And, principles of estoppel have been applied to bind non-parties who, by conduct, acquiescence or delay, induce others to believe that they will be bound by the outcome of litigation. See, e.g., Christiansen v. Farmers Ins. Exchange, 540 F.2d 472 (5th Cir. 1972); Awtry v. United States, 684 F.2d 896, 898-899 (Ct. Claims 1982); Restatement (Second) of Judgments, § 62 (1982); cf. Ohio v. Kentucky, 410 U.S. 641, 651 (1973) (acquiescence in location of border).

Indeed, this Court has itself twice embraced the principle that is central to this case -- namely, that non-parties may be bound by the results of a lawsuit if they had notice and failed to

intervene to assert their own interests. See Penn-Central and N&W Inclusion Cases, 389 U.S. 486, 505-506 (1968); Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968). In Penn Central, the Court held that a non-party to proceedings in New York was precluded from litigating in parallel Pennsylvania proceedings issues resolved in New York, because the non-party had and declined "an adequate opportunity to join in" the New York action. 389 U.S. at 505. That same year, the Court suggested in Provident Tradesman's Bank that preclusion might apply to those who "purposely bypassed an adequate opportunity to intervene." 390 U.S. at 114. The principle recognized in these cases has been applied regularly in the lower federal

courts. See, e.g., Safir v. Dole, 718 F.2d 475, 482-83 (D.C. Cir. 1983) (Scalia, J.), cert. denied, 467 U.S. 1206 (1984); Bergh v. State of Washington, 535 F.2d 505, 507 (9th Cir. 1976) (Kennedy, J.); Grann v. City of Madison, 738 F.2d 786, 794-96 (7th Cir.); cert. den. 469 U.S. 918 (1984); Adams v. Bell, 711 F.2d 161, 168-170 (D.C. Cir. 1983) (en banc), cert. denied 465 U.S. 1021 (1984); National Wildlife Federation v. Gorsuch, 744 F.2d at 967. As set forth below, amici urge the Court to apply this principle here.

2. This Court Should Apply Penn Central and Provident Tradesman's Bank to Bar Collateral Attacks on Consent Decrees

A rule based on Penn Central and Provident Tradesman's Bank that bars

collateral attacks brought by those who had the opportunity to intervene on a timely basis, like the rules of preclusion applied to non-parties in the various circumstances set forth above, promotes the compelling interests that generally underlie the doctrines of res judicata and collateral estoppel -- "protect[ing] adversaries from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. at 153-154 (footnote omitted); see also Nevada v. United States, 463 U.S. at 129. The rule adopted by the Eleventh Circuit, by contrast, radically undermines the interests protected by

rules of preclusion, and should be rejected by this Court.

a. Collateral Attacks Undermine Finality

First, the related interests of finality and judicial economy weigh heavily. In an era of overcrowded court dockets, it is difficult to justify permitting those with notice of a lawsuit that might affect their rights to abstain deliberately from participation as party intervenors. Where such parties sit on the sidelines or, as here, wait until the eleventh hour to seek intervention and then, if unsuccessful, launch a later collateral suit, a second court is asked to examine the very same matters that were, or could have been, decided in the first action. Federal courts can ill-afford to allocate

precious resources to indulge such sandbagging and "deliberate tactical jockeying." 18 Wright, Miller & Cooper, Federal Practice and Procedure, § 4457, at 495 (1981).

Moreover, permitting interested persons to bypass intervention in favor of a second round of protracted litigation will only delay final resolution of the dispute. Such delay is especially harmful in the context of public employment. For if the employer is unable to fill positions in the face of lengthy, continuing litigation, vitally important public safety needs may well go unmet. If, on the other hand, the employer proceeds to to fill vacant positions in accordance with the consent decree, even in the face of a second lawsuit challenging the practices authorized

by the decree, a different set of difficulties -- no less troubling -- will arise. If candidates are appointed to positions pursuant to the consent decree during the second litigation, and such appointments are later invalidated, the employer and employees might face demands that people be removed from jobs. Such a circumstance would, in turn, raise difficult questions in many civil service systems, where important rights relating to seniority pensions, other benefits, and eligibility for promotion, may accrue by virtue of an employee's holding a position. At the very least, the continued cloud of uncertainty and division that will hang over the workplace is likely to exact a high cost in employee morale and productivity. Thus, for public

employers, public employees and the public at large, long delays in the final resolution of Title VII litigation carries with it disturbing consequences -- consequences that are avoided by a rule barring collateral attacks by those who could have intervened timely in the earlier litigation.

b. Collateral Attacks Undermine Settlement Incentives

Collateral attacks on consent decrees severely undermine the congressional intent that "[c]ooperation and voluntary compliance" be the "preferred means for achieving" the purposes of Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Local 93, International

Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. at 3072; 3076, n. 13 (1986). The many consent decrees that are entered into in Title VII and related cases demonstrate that Congress has achieved some success in effectuating this policy. For example, in the year ending June 30, 1987, there were 310 civil rights employment cases in the federal courts (involving both public and private employers) that were terminated by a consent decree granting some form of relief to plaintiff(s); for the year ending June 30, 1986, there were 344.[2/]

These statistics suggest that, given the frequent use of consent decrees in

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2/ Unpublished figures available from the Statistical and Reports Division of the Administrative Office of the United States Courts, Washington, D.C.

employment cases, chaos and confusion will likely result if this Court adopts the Eleventh Circuit's approach as its own. Such a departure from the majority rule barring collateral attacks may well produce an onslaught of new challenges to consent decrees that have been in place for years, on which employees and employers have long relied, and which have continuing and present effect.

Moreover, the prospective effect clearly will be to discourage settlements in Title VII cases. Public employers who know that a consent decree is subject to later collateral attack by other employees will have little incentive to settle Title VII cases, no matter how meritorious the plaintiff's claims, no matter how costly further litigation may be in taxpayer's dollars,

and no matter how fair and appropriate a proposed settlement may be. Plaintiff employees will likewise be understandably reticent to settle if the prospect of a collateral attack by those who have chosen to sit on the sidelines may be right around the corner. Thus, the congressional policy favoring voluntary compliance settlement will likely be the first casualty of a holding by this Court rejecting the majority rule barring collateral attacks.[3/]

3/ Rejecting the majority rule against collateral attacks will affect not only state employers' willingness to settle cases; it will also weaken the ability of the states to enforce their own civil rights statutes. Pursuant to 42 U.S.C. §§ 2000e-5(c), 2000e-8(b), many state and local antidiscrimination agencies have cooperative agreements with the Equal Employment Opportunity Commission, through which the state or local agency assumes jurisdiction of claims

(footnote continued)

Indeed, if this Court adopts a rule permitting collateral attacks on consent decrees, its decision will also undermine settlement in other kinds of public law litigation where consent decrees have been usefully employed, such as environmental, school desegregation and other institutional reform cases. Such a result would be unfortunate because, in appropriate circumstances, consent decrees may represent the best vehicle

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(footnote continued)

cognizable under both Title VII and the cognate state or local anti-discrimination laws. Because of frequent docket overcrowding and resource constraints, consent decrees are a vital enforcement tool for the states. A decision by this Court that subjects such decrees to easy collateral attack will seriously hamper state enforcement efforts in this important area.

for bringing about needed reforms in a way that permits public entities to participate in shaping the relief, and so to produce a better, more practicable decree -- subject, of course, to full judicial review and approval in the first instance, and continuing judicial oversight as necessary. See generally Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiate Institutional Reform, 1984 Duke L.J. 887. In addition, consent decrees save the parties and the courts the time and expense of large-scale litigation and spare each party the risk of losing a "winner-take-all" trial. Id. at 898-899. Thus, this Court should not lightly adopt a rule that will so decisively undercut

the efficacy of consent decrees. See Local 93, 106 S. Ct. at 3076 n. 13 (discussing advantages of consent decrees).

c. Collateral Attacks Undermine Compliance With Court Orders

Collateral attacks on Title VII consent decrees will create a substantial risk that employers will be subject to conflicting and inconsistent obligations. Where a consent decree authorizes race-conscious procedures in promotional selection, for example, and a subsequent order in collateral litigation bars any such procedures, the employer will be faced with diametrically opposite obligations imposed by different courts. The employer may well be forced into contempt of one or the other

court's order. As chief law enforcement officials, amici are particularly concerned that such a spectacle, arising in the context of highly publicized cases concerning public employment, will provoke or exacerbate race- and gender-based divisions by forcing public employers to "choose" which order to honor, and so will seriously undermine public faith in the rule of law and in the judicial sys- tem. That result is wisely avoided by the collateral attack rule adopted by the majority of the courts of appeals.

d. Collateral Attacks Undermine Fairness

A rule permitting collateral attacks by parties who have declined to intervene on a timely basis is, put simply, unfair. Rules of preclusion

have traditionally been shaped by principles of fairness. See e.g., Hansberry v. Lee, 311 U.S. at 42; United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966); Restatement (Second) of Judgments, § 19, com. a (1982). It is, in turn, a fundamental principle that those who sleep on their rights may properly have to suffer the consequences. See, e.g., Ohio v. Kentucky, 410 U.S. at 651; Awtry v. United States, supra, 684 F.2d at 898; International Union, Allied Industrial Workers of America v. Local Union No. 589, 693 F.2d 666, 674 (7th Cir. 1982) (per curiam); 1 J. Pomeroy Equity Jurisprudence, §§ 418-419 (4th Ed. 1918). Indeed, it is precisely this principle that led this Court in Penn Central and Provident Tradesman's Bank

to observe that those who intentionally bypass an opportunity to intervene in litigation may be subject to preclusion.

This same principle of fairness guides courts in determining, in their discretion, whether a motion to intervene is timely -- even a motion to intervene as of right. In deciding such motions, courts generally look to the time during which the would-be intervenor should have known of its interest before intervening; the prejudice to the existing parties as a result of the would-be intervenor's delay; the prejudice to the would-be intervenor if its motion is denied; and any unusual circumstances in the case. See Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977); South v. Rowe, 759 F.2d 610 (7th Cir. 1985);

see generally NAACP v. New York, 413 U.S. 345, 365-368 (1973). Here, the Eleventh Circuit applied these factors and upheld the denial of the Respondents' eleventh-hour motion to intervene in the prior proceedings, based on the untimeliness of their motion. See Jefferson County, 720 F.2d at 1516-1519. In so doing, that court expressly found that members of the Birmingham Firefighters Association "knew at an early stage in the [prior] proceedings that their rights could be adversely affected," 720 F.2d at 1516, and that "having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain." Id. at 1517.

Despite finding that Respondents had unjustifiably slept on their rights -- dispositive for intervention purposes -- the Eleventh Circuit went on in the decision on review here to allow Respondents to achieve by collateral attack the very same purpose sought by their late attempt at intervention: to attack the validity of the decree.

Not only does the Eleventh Circuit's inconsistent approach improperly excuse persons who fail to protect their rights by intervening on a timely basis, it clearly rewards them for doing so. Had Respondents timely intervened, their claims would have been decided in this litigation, resolving the entire dispute once and for all. By instead hedging their bets, and making no timely motion to intervene, Respondents were free to

monitor the litigation closely from the outset, to offer tactical assistance, and even to be heard in opposition to the consent decree at the fairness hearing, making the same substantive legal arguments they would have made as a party. Despite all of this, according to the court below, Respondents are not bound by the resulting decree.

Thus, Respondents had it the proverbial "both ways" -- at tremendous cost to the Petitioners, to the courts and to all affected employees in Birmingham, who continue to await final resolution of a long and divisive battle that is now nearly fifteen years old. See Bolden v. Pennsylvania State Police, 578 F.2d 912, 916 (3d Cir. 1978) (denying union's late motion to

intervene where union improperly sought "the best of all possible worlds").

e. Collateral Attacks Undermine Comity

Finally, permitting collateral attacks invites the very sort of jurisdictional conflicts and duplication of litigation that the doctrine of comity is designed to avoid. See Local 93, 106 S. Ct. at 3076 n. 13 (noting advantages of channeling litigation concerning consent decrees into single forum). Collateral attacks on federal consent decrees may be assigned to a different federal judge in the same judicial district, may be filed in a different judicial district altogether or may be filed in state court. Similarly, a collateral attack on a state court decree may be filed in federal court. In any

of these circumstances, one court may be faced with the task of reviewing, reshaping or nullifying entirely the order of another court. And, the second court will be asked to adjudicate the validity of the consent decree without the long years of experience and detailed familiarity that the judge who entered the decree as an order will frequently possess. Permitting collateral attacks thus clearly invites unseemly forum-shopping, and even judge-shopping.[4/]

These results are avoided by the majority rule barring collateral

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4/ Indeed, Respondents in this case attempted mightily, but ultimately unsuccessfully, to have their collateral attacks assigned to a different district judge than the one who entered the consent decree. J.A. 147-148; 196-201; 209-217.

attacks, for through the operation of that rule, "restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense, and has a salutory effect upon the prompt and efficient administration of justice." Bergh v. State of Washington, 535 F.2d at 507 (Kennedy, J.) (quoting Brittingham v. Commissioner, 451 F.2d 315, 318 (5th Cir. 1971)) (rejecting collateral attack on judgment where party had the opportunity to intervene in prior proceedings); Goins v. Bethlehem Steel, 657 F.2d at 64 (rejecting collateral attack as impermissible attempt to appeal from one district judge to another).

B. Barring Collateral Attacks By Those Who Had Notice and Failed to Intervene On a Timely Basis Does Not Violate Due Process

Amici fully recognize that the due process clause imposes limits on the extent to which non-parties to previous litigation may be bound by orders issued in such litigation, Hansberry v. Lee, 311 U.S. at 40-41, and the rule amici urge requires that persons be afforded notice and an opportunity to be heard before entry of a consent decree.

Due process demands, "in any proceeding which is to be accorded finality...notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover

Bank & Trust Co., 339 U.S. 306, 314 (1950). There is, however, no "formula" for due process. Mullane, 339 U.S. at 314. What constitutes adequate notice and opportunity to be heard varies in each case, where the individual's interests must be balanced against the need for efficiency, economy and the ends sought to be achieved by the substantive law. See Mullane, 339 U.S. at 313-314; American Land Co. v. Zeiss, 219 U.S. 47, 67 (1911). Employing this analysis, courts have upheld against due process attacks rules subjecting non-parties to preclusion in different contexts. See e.g., id. at 64-70 (proceedings relating to land); Hanover National Bank v. Moyses, 186 U.S. 181, 190-192 (1902) (bankruptcy proceedings).

Due process was more than satisfied in this case because of the Respondents' long-spurned opportunity to intervene in the prior action. The Eleventh Circuit expressly recognized that the BFA's members knew that their interests could be adversely affected, yet chose not to intervene. Indeed, Respondents' actual notice of the prior proceedings from an early point appears not to be contested in this case -- nor is it likely that it could be, as cases challenging public employment practices as discriminatory typically generate widespread media attention. See, e.g., Culbreath v. Dukakis, 630 F.2d at 18; 21. Respondents likewise had notice of the proposed consent decree and the fairness hearing, well in advance of that hearing. Despite such notice,

Respondents unjustifiably declined to move for intervention at any point until after the fairness hearing, on the eve of adoption of the decree.[5/]

In these circumstances, Respondents' notice of the lawsuit and several year-long opportunity to intervene satisfy due process, for it is the opportunity to be heard that is crucial. Boddie v. Connecticut, 401 U.S. 371, 378

5/ Amici do not advocate any bright line test for determining when a non-party has had a meaningful opportunity to intervene. Consistent with Mullane, such a determination must be made on a case-by-case basis. Fed. R. Civ. P. 24 provides an appropriate mechanism for determining timeliness in each case, and this Court has recognized that the district judge, who is closest to the facts of each case, enjoys substantial discretion in evaluating the timeliness of a motion to intervene, subject to review for abuse of discretion. See NAACP v. New York, 413 U.S. at 366-368. Here, the district judge made that determination and his denial of the motion to intervene was upheld on appeal.

(1971); see Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Indeed, this Court has recognized that "[d]ue process does not, of course, require that the defendant in every civil case actually have a hearing on the merits," and has accordingly held that "the hearing required by due process is subject to waiver." Boddie, 401 U.S. at 378-79. Respondents may fairly be said to have waived their opportunity to intervene in this case.

Although amici believe the opportunity to intervene is itself sufficient to satisfy due process, it is worth noting that in this case Respondents were also accorded a full opportunity to be heard at the fairness hearing, where their present attorney, in fact, made

the same arguments attacking the decree that he now asserts in these collateral proceedings. Thus, well more than the constitutional minimum was afforded here.

II. AN ALTERNATIVE RULE REQUIRING MANDATORY JOINDER IS WHOLLY INAPPROPRIATE

As set forth above, amici believe that persons with notice and an opportunity to intervene on a timely basis before entry of a consent decree should be bound, as a matter of preclusion law. Amici thus believe that a motion to intervene pursuant to Fed. R. Civ. P. 24 is the appropriate means for interested persons to participate in proceedings that may affect them. The suggestion was made to this Court last Term in Marino v. Ortiz, that mandatory joinder under Fed. R. Civ. P. 19 is instead the appropriate vehicle. Under

this view, if parties to a consent decree wish to assert its preclusive effect against other persons, it is the parties' responsibility to join such persons in the action. As amici demonstrate below, that suggestion is deeply flawed, and has especially grave implications for Title VII litigation.

A. Mandatory Mass Joinder of Potentially Affected Persons Will Create Serious Practical Problems That Are Avoided By Voluntary Intervention

The premise of the mandatory joinder argument is that no preclusive effect may be accorded Title VII consent decrees unless affected persons are joined as parties. Should this Court adopt such a rule, the inevitable effect will be that parties instituting Title VII litigation will believe that, in order to obtain meaningful, final and

binding relief, they must join as parties anyone who may one day claim to be affected by that relief.

The practical consequences of such a rule are staggering. The puzzling threshold question for one seeking to vindicate equal employment opportunity rights under Title VII will be just whom to sue. While the employer is the natural defendant, a mandatory joinder rule would require suing many, or even all, fellow employees as well. If the case concerns promotional practices, how is the plaintiff to know who may one day aspire to a particular promotion? If the case concerns entry level jobs, how is the plaintiff to know who may one day seek such a position? By contrast, requiring interested persons with notice of the plaintiff's suit to make a timely

motion to intervene wholly eliminates this uncertainty. Such a course appropriately leaves it to those who, with notice, believe that their interests are at stake to protect those interests.

Moreover, compelling Title VII plaintiffs to join all those who might conceivably claim to be affected parties may mean suits involving hundreds or even thousands of people, especially in cases involving a large public workforce. Compelled joinder of this magnitude will impose a crushing financial burden on a plaintiff as a condition of vindicating the rights protected under Title VII. The mere cost of duplicating and serving process on so many defendants may well itself be prohibitive.

Nor are the financial costs limited to the plaintiff. Those involuntarily joined as defendants, too, will be forced to incur costs -- the cost of retaining an attorney, and then the cost of <u>either</u> participating in discovery, motion practice and trial <u>or</u>, alternatively, litigating to be dismissed as an improper or unnecessary party defendant. Indeed, mandatory joinder of large numbers of co-employees is likely to spawn a costly, burdensome new subset of motions concerning who is and is not a properly joined co-defendant under Title VII. This is especially so because many involuntarily joined employees will have strong incentives to seek dismissal: to avoid the costs and time involved in the litigation, to avoid potential liability as a co-defendant

(such as for attorneys' fees) and, perhaps most importantly, to avoid being bound, and instead to remain free to institute a second, separate lawsuit.

Furthermore, the costs of mandatory joinder cannot be measured in dollars or judicial time alone. Rather, mandatory, mass joinder of co-defendants is likely to exact a tremendous cost in workplace morale, collegiality and productivity -- an area of great concern to states, as public employers and administrators of public personnel systems. Compelling plaintiffs to sue fellow employees en masse means compelling plaintiffs to impose the substantial burdens and costs of litigation on their fellow workers, and in effect, if not intent, to charge their colleagues with wrongdoing. The

unavoidable effect of involuntary mass joinder is to equate those alleged with perpetrating discrimination with those who may have benefited from such discrimination. Such compelled joinder can only provoke resentment, divisiveness and disruption.

A mandatory joinder rule will, in short, plainly undermine the achievement of Title VII's important remedial purposes, and ultimately chill the filing of Title VII actions. As it has in the past, this Court should decline to adopt procedural rules that are "inconsistent with the underlying purposes of the statute." Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977) (declining to apply short state statute of

limitations to Title VII); accord Oscar Mayer & Co. v. Evans, 441 U.S. 750, 763 (1979).

Nor would these serious problems evaporate if the burden involuntarily to join co-employees falls to the defendant employer, instead of the plaintiff. The specter of an employer dragging scores of its employees into litigation -- whether as co-defendants or adverse parties -- does nothing to mitigate the problems of dividing the employee population and undermining morale, nor the problem of imposing financial costs on the involuntarily joined employees. Instead, it may well only exacerbate these problems by driving a wedge between the employer and the employees whom it involuntarily brings into court -- and ultimately making far more difficult the task of reconciling all

employees to necessary changes in the workplace.

Self-selected intervention by those with notice of the proceedings who wish to participate does not create these risks. It does not impose the potentially huge financial and interpersonal costs of mass joinder on a plaintiff, nor does it visit the unwanted burden and expense of litigation on involuntarily joined individual defendants. Instead, only those employees wishing to assert their own interests will intervene. Provided that their motion to do so is asserted on a timely basis, it is likely to be, and ought to be, granted. See, e.g., Howard v. McLucas, 782 F.2d 956, 959-60 (11th Cir. 1986).

B. Neither Joinder of a Defendant Class, Nor Joinder of Unions, Will Resolve The Serious Practical Problems with Mandatory Joinder.

Many of the problems caused by a rule requiring mandatory joinder of all interested individuals might appear, at first blush, to be avoidable through the use of defendant class actions or the joinder of unions as defendants. On closer examination, however, these approaches prove to be no panacea for the problems of mandatory joinder. Indeed, either approach would likely itself generate a burdensome series of side-disputes that would delay and distract from the resolution of the central Title VII claims.

1. Defendant Class Actions Would Be Unworkable

Defendant class actions in Title VII cases would be unworkable for a number of reasons. First, it may be difficult to find a defendant class representative who is willing and able to undertake the burden and expense of the litigation. This problem is exacerbated where, as here, neither the putative class representative, nor the class members, have any incentive to be bound by the results of the litigation. To the contrary, employees opposed to Title VII relief, in order to preserve their freedom to bring later collateral attacks on the relief ultimately agreed to or awarded, will more likely purposely avoid -- indeed, resist -- party status. E.g., Bolden

v. Pennsylvania State Police, 578 F.2d at 916.

Moreover, a person named as representative of a defendant class has every incentive to provide inadequate representation, knowing that this will pave the way for later collateral attacks by class members arguing that they were inadequately represented in, and thus not bound by, the earlier litigation. These attacks, if successful, will result in relief from the consent decree that would benefit not only the attackers, but all existing employees, including the original class representatives. In terms of both resources and results, then, unwilling defendant class representatives have everything to gain and nothing to lose from providing weak representation.

Defendant class representatives designated by plaintiffs will face additional difficulties in providing adequate representation, because of the likely divergence of interests within the defendant class. Class members' interests will vary according to their seniority, rank, department, and status as a present, as opposed to future, employee. Those defendant class members with less to lose will at some point come to favor settlement, whereas those with the most to lose will favor litigation to the bitter end. It therefore appears likely that, unless proper subclasses are designated, representation will be inadequate and the consent decree will remain subject to later attack.

Yet it is defendant class members who will be in the best position to sort themselves into adequately representative subclasses. Under a mandatory joinder approach however, they will have little incentive to do so, knowing that inadequate representation will preserve their freedom to bring later attacks. It is only where interested persons with notice and an opportunity to intervene are held to be bound that those persons will have any incentive to designate adequate class representatives.

None of these serious problems is posed where interested employees themselves seek to intervene, and choose to do so as a class. In such a circumstance, they will select their own representative, they will divide into

appropriate subclasses if necessary, and their chosen representatives will be fully motivated to provide full and adequate representation.

2. Mandatory Joinder of Unions Would Also Be Unworkable

It is likewise no answer to suggest that Title VII plaintiffs may easily bind all interested parties simply by suing the union. Such suits will present their own particular problems in the Title VII context.

Most important, the adequacy-of-representation problems identified above are not alleviated simply by suing the union. The represented class will still be divided along lines of rank, seniority, and department, and it is open to question whether a union composed of

existing employees would adequately represent the interests of future non-minority applicants for employment. Additionally, there is the potential for divergence of interests between the union itself and its own members. The union may face back pay and attorney's fee liability under 42 U.S.C. §§ 2000e-5 (g), (k), and consequently the union may have a strong incentive to settle the case quickly and without any admission of involvement in past discrimination. Union members, on the other hand, may feel less directly affected by such liability and more interested in avoiding prospective relief at any cost; they thus will favor litigation over settlement.

Indeed, this Court has recently recognized that unions and similar associations:

> will not always be able to represent adequately the interests of all their injured members. Should an association be deficient in this regard, a judgment won against it might not preclude subsequent claims by the association's members without offending due process principles. And were we presented with evidence that such a problem existed . . ., we would have to consider how it might be alleviated.

International Union, United Automobile Workers v. Brock, 477 U.S. 274, 290 (1986). Because the mandatory joinder approach presents potential for inadequate representation, this Court should "consider how it might be alleviated" and adopt a mandatory intervention approach in this case. The alternative is to leave to the lower courts the burdensome task of dealing

with the spate of collateral attacks alleging inadequate representation that are likely to ensue from the adoption of a mandatory joinder approach.

CONCLUSION

A rule barring collateral attacks by those who have had and declined a fair opportunity to intervene in an action on a timely basis promotes compelling interests served by preclusion law, satisfies due process requirements and appropriately relies on self-selected intervention by interested parties. An alternative rule requiring mandatory joinder, by contrast, is impractical, burdensome for all, and inconsistent with the policies underlying Title VII.

For all of the foregoing reasons, amici respectfully urge that the

judgment of the Eleventh Circuit be reversed.

Respectfully submitted,

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